U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18052183

Date: DEC. 9, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a pizza restaurant, seeks to employ the Beneficiary as an operations research manager. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the grounds that (1) a *bona fide* job offer open to U.S. workers did not exist because a pre-existing business relationship between the Beneficiary and members of the Petitioner's management was not revealed on the labor certification and (2) the Petitioner willfully misrepresented material facts by failing to disclose a familial, friendship, business, or financial relationship between its owners and the Beneficiary on the labor certification, and also by submitting "fabricated" evidence of the Beneficiary's experience.

On appeal the Petitioner submits a brief and additional documentation, asserts that the Director's decision was incorrect in every respect, and requests that the petition be approved. The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS

approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. *Bona Fides* of the Job Opportunity

In section N of the labor certification (Employer Declaration) the Petitioner certified 10 conditions of employment for the proffered position of operations research manager, one of which was: "The job opportunity has been and is clearly open to any U.S. worker." This certification accorded with the regulation at 20 C.F.R. § 656.10(c)(8) which requires an employer to attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

In denying the petition the Director stated that "[i]t is unclear how there is a bona fide job offer because the beneficiary appears to have a pre-existing business relationship with members of the Petitioner's management." This statement was based on evidence in the record, emanating from a nonimmigrant visa application filed by the Beneficiary and information provided by the Petitioner in this proceeding, that two of the Petitioner's four co-owners (members) had ownership interests in another restaurant that was majority owned by the Beneficiary. A pre-existing business relationship between the Beneficiary and co-owners of the Petitioner, however, is not *ipso facto* proof that the job offer at issue was not open to U.S. workers, and does not disqualify the Beneficiary from being considered for the position.

The Director pointed out that the Petitioner answered "No" to the compound question on page 1, item C.9, of the labor certification which reads: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Director concluded that "the petitioner failed to disclose a familial, friendship, business or financial relationship between its owners and the beneficiary." This conclusion does not logically flow from the Petitioner's answer of "No" at section C.9, however, because (1) there is no familial relationship between the Beneficiary and anyone associated with the Petitioner as far as the record shows, and (2) the question at C.9 does not ask generally whether there is a relationship between the Petitioner and the Beneficiary based on friendship, business or financial ties, but instead asks specifically whether the Beneficiary has an ownership interest in the Petitioner. The answer to that question is No based on the record as currently constituted, and that is the answer the Petitioner provided on the labor certification.

For the reasons discussed above the Director's conclusion that "the evidence does not show that the petitioner made a bona fide job offer to the beneficiary" to the extent that it is based on the response to C.9. is not well grounded. Accordingly, we will remand this case for further consideration of this issue.

B. Misrepresentation of Fact Concerning Relationship between Petitioner and Beneficiary

A misrepresentation is a representation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980). Any alien who seeks an immigration benefit by fraud or willfully misrepresenting a material fact is ineligible for a visa or admission to the United States. *See* section 212(a)(6)(C)(i) of the Act.

The Director's finding that the Petitioner willfully misrepresented a material fact concerning the relationship between the Beneficiary and some of the Petitioner's co-owners is based almost exclusively on the Petitioner's answer to the question at C.9 of the labor certification. The finding is fundamentally flawed, however, because it misconstrues the question's content, and therefore misinterprets the Petitioner's answer thereto. As previously discussed, there are two distinct questions at section C.9:

1. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest?

2. Is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The answer to question 1 appears to be "No" since the record does not show that the Beneficiary has an ownership interest in the Petitioner.

The answer to question 2 also appears to be "No" because the record does not show that there is a familial relationship between the Beneficiary and any owner or incorporator of the Petitioner (as an LLC, it has members) or between the Beneficiary and any corporate officer of the Petitioner.

Accordingly, there is currently no factual basis for the Director's finding that the Petitioner willfully misrepresented a material fact in its answer to the question at section C.9 of the labor certification. We will withdraw the Director's finding on this issue.

C. Beneficiary's Experience

The labor certification requires two years of experience in the job offered or any other managerial position. While the Director's decision made no specific determination with respect to the Beneficiary's qualifying experience, it characterized letters from three businesses which claim to have employed the Beneficiary in prior years as "unacceptable because they appear to be fabricated and not individual accounts of the beneficiary's work history." The submission of "evidence that appears to

be fabricated," the Director stated, constituted a willful misrepresentation of fact by the Petitioner that was material to the Beneficiary's eligibility for the requested benefit. The Director provided little substantive analysis of the letters, however, and did not explain what he meant in calling them "fabricated." Most importantly, the Director made no concrete determination that the Beneficiary did not meet the experience requirement stated in the labor certification. The Director may wish to provide more detail to the Petitioner, and examine this issue more fully on remand.

D. Petitioner's Ability to Pay the Proffered Wage

Though not addressed in the denial decision, the Director may wish to explore this issue on remand. To be eligible for the visa classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date[1] is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

In this case the proffered wage is $57,408 per year and the priority date is March 1, 2020. Thus, the Petitioner must establish its continuing ability to pay the proffered wage from March 1, 2020, up to the present.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case there is no evidence that the Petitioner has ever employed the Beneficiary. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of March 1, 2020, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary

[1] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

With its initial evidence the Petitioner submitted a copy of its federal income tax return (Form 1065, U.S. Return of Partnership Income) for 2019, which was likely the Petitioner's most recent return at the time the instant petition was filed in July 2020. Since the priority date of the petition is in 2020, however, that is the first year for which the Petitioner must demonstrate its ability to pay the proffered wage. Without a copy of the Petitioner's 2020 federal tax return (or an annual report or audited financial statement for 2020), we are unable to determine the Petitioner's ability to pay the proffered wage based on its net income or net current assets from the priority date of March 1, 2020, onward.

On remand, therefore the Director may request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the year 2020, and 2021 if available, along with any other pertinent evidence of the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

In accord with the foregoing analysis, we will withdraw the Director's decision and remand the case for further consideration of the issues discussed in our decision and any other issue(s) the Director may deem relevant. At his discretion, the Director may request additional evidence from the Petitioner. Following the Petitioner's response to such a request, or the expiration of the time period to respond, the Director shall issue a new decision. The Petitioner bears the burden of proof to demonstrate eligibility for the requested immigration benefit by a preponderance of the evidence. *See* section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

ORDER: The Director's decision is withdrawn. The matter is remanded for further consideration and the entry of a new decision.